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SANCTUARY JURISDICTIONS: IN A SYSTEM OF CHECKS AND BALANCES WHO HAS THE AUTHORITY TO DEFEAT THEM?

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INTRODUCTION

There is no doubt that for the Trump administration, immigration enforcement and mass deportation are at the top of the agenda.¹ Even before taking office on January 20, 2017, United States President Donald Trump (“President Trump”) vowed to deport all immigrants with serious criminal records—the “bad hombres.”² His administration, however, has deported more than just Mexican “criminals, drug dealers, and rapists.”³ Deportation, prolonged

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¹ Even as a presidential candidate, President Trump promised to deport over two million unauthorized immigrants which he argued had “committed crimes.” Allissa Wickham, *Trump’s Plan to Deport 2M Immigrants Will Face Roadblocks*, LAW360, Nov. 16, 2016.

² *Id.*; Kevin Penton, *Even ‘Good Hombres’ Not Safe from Removal: 9th Circ. Judge*, LAW360, May 30, 2017.

³ See Penton, *supra* note 2; Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, THE WASH. POST, Jul. 8,

detentions, denaturalization and family separation are but a few of the challenges faced by the immigrant community in the Trump Era.⁴ The Department of Justice, under President Trump, has aggressively enforced federal immigration laws, invoking great fear in immigrant communities across the nation.⁵

In response to this hardline position on immigration enforcement, several jurisdictions throughout the United States declared themselves “sanctuaries,” or reaffirmed their already in-place sanctuary status.⁶ Sanctuary jurisdictions in the United States are not a new concept, they trace back to the 1980s.⁷ They originally emerged to protect refugees with legitimate claims to asylum from federal immigration enforcement.⁸ Today’s sanctuary jurisdictions limit the enforcement of federal immigration laws against all immigrants with strong ties to the community that have no serious criminal record.⁹ Sanctuary policies, however, vary from jurisdiction to jurisdiction.¹⁰

When a United States citizen is pulled over for a broken tail light, they do not expect their lives to be significantly turned around.¹¹ On

2015; Brian Bennett, *Not Just ‘Bad Hombres’: Trump is Targeting up to 8 Million People for Deportation*, L.A. TIMES, Feb. 4, 2017.

⁴ In 2017, ICE arrested 37,670 individuals without criminal record by October, a 125% increase from the prior year. Amanda Holpuch, *I Live in Fear: Under Trump, Life for America’s Immigrants Can Change in a Flash*, THE GUARDIAN, Oct. 18, 2018.

⁵ *Id.*

⁶ See, e.g., Kore Rumore, *Chicago’s History as a Sanctuary City*, CHI. TRIB., Oct. 13, 2017; Jazmine Ulloa, *California Becomes ‘Sanctuary State’ in Rebuke of Trump Immigration Policy*, L.A. TIMES, Oct. 5, 2017.

⁷ Elizabeth M. McCormik, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 173-74 (2016).

⁸ *Id.*

⁹ See *Id.*; see also, e.g., Ulloa, *supra* note 6.

¹⁰ See Rumore, *supra* note 6. For the City of Chicago being a sanctuary means providing a safe home to all Chicagoans, regardless of his or her immigration status. Chicago’s sanctuary policy is a “commitment to inclusion.” *Id.*

¹¹ See Tamara Lyte, *Increased Enforcement Threatens Undocumented Immigrants*, USA TODAY’S HISPANIC LIVING MAGAZINE, Sep. 23, 2017.

the other hand, for an undocumented immigrant, this same situation can be detrimental to his or her future.¹² If they do not have a valid driver's license, they will be arrested and can be turned over to Immigration and Customs Enforcement ("ICE") for deportation, even if they have no serious criminal record.¹³ Many times, this results in prolonged detention periods by the local law enforcement, which violates the individual's due process rights.¹⁴ In 2012, Chicago Mayor Emmanuel signed the "Welcoming City Ordinance" that ensured undocumented immigrants are not arrested solely because of their immigration status.¹⁵

Sanctuary policies such as the Welcoming City Ordinance of Chicago threaten President Trump's immigration enforcement agenda,¹⁶ making them a target of his administration.¹⁷ On January 25, 2017, only five days after his inauguration, President Trump issued an executive order requiring former U.S. Attorney General Jeff Sessions ("Attorney General Sessions") to ensure sanctuary jurisdictions were not eligible to receive certain federal funding.¹⁸ It was an effort to force sanctuary jurisdictions to cooperate in the enforcement of federal immigration laws.¹⁹ This order, however was challenged in a federal court in California where it was permanently enjoined.²⁰

Despite these failed efforts, in July 2017 Attorney General Sessions continued to threaten to withhold federal funding from sanctuary jurisdictions that failed to cooperate in the enforcement of

¹² *See Id.*

¹³ *See Id.*

¹⁴ *See Id.*

¹⁵ Rumore, *supra* note 4.

¹⁶ *See Wickham, supra* note 1.

¹⁷ *See Rumore, supra* note 6.

¹⁸ *City of Chi. v. Sessions*, 888 F.3d at 276-80 (7th Cir. 2018), *reh'g en banc granted in part, vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. 2018) and *vacated*, No. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. 2018).

¹⁹ *Id.*

²⁰ *Id.*

federal immigration laws.²¹ He added three new conditions to the Edward Byrne Memorial Justice Assistance Grant (“Byrne Grant”).²² That grant provides state and local law enforcement agencies with substantial funds for personnel, equipment, training and other expenses.²³ To continue to receive the Byrne Grant, Chicago and other state and local jurisdictions were required to: (1) give immigration agents unrestricted access to police stations; (2) give immigration agents at least forty-eight hour notice before a detainee was released;²⁴ and (3) comply with a federal statute that encourages information sharing between local law enforcement and federal immigration agents.²⁵

Chicago, like other jurisdictions, did not give up its sanctuary policies.²⁶ Mayor Emmanuel said, “We will never be coerced or intimidated into abandoning our values as a welcoming city.”²⁷ Instead, Chicago was the first to file a lawsuit against the Department of Justice challenging these new conditions to the Byrne Grant,²⁸ arguing that the conditions were unconstitutional.²⁹

The United States District Court for the Northern District of Illinois agreed with Chicago that the Executive Branch had overstepped the authority granted to them by the United States Constitution.³⁰ On September 15, 2017, the district court granted in part Chicago’s motion for preliminary injunction.³¹ The court held that

²¹ *Id.* at 276-77.

²² *Id.*

²³ *Id.* at 276-280; *City of Chi. v. Sessions*, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).

²⁴ *City of Chi.*, 888 F.3d at 276-77.

²⁵ *City of Chi.*, 264 F. Supp. 3d at 937.

²⁶ Rumore, *supra* note 4.

²⁷ Dianna Novak Jones, *Immigration Info Law Unconstitutional in Sanctuary City Row*, LAW360, July 27, 2017.

²⁸ *Id.*

²⁹ *City of Chi.*, 888 F.3d at 276-77.

³⁰ *Id.*

³¹ *City of Chi. v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017).

two of the three conditions were unconstitutional: the access and notice conditions.³² The district court found that Congress had not authorized Attorney General Sessions to impose these conditions in the first place.³³ Attorney General Sessions appealed the preliminary injunction to the access and notice conditions.³⁴

On April 19, 2018, the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”) affirmed the lower court’s decision.³⁵ In reviewing the decision, the Seventh Circuit underlined that the issue before it was separation of powers and not immigration policy.³⁶ The Seventh Circuit found that the Executive Branch’s actions were an “usurpation of power” because there was no congressional authorization for its actions and there was evidence that Congress repeatedly refused to impose conditions that tied funding to immigration policies.³⁷ Judge Rovner said: “We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”³⁸

The three-judge panel agreed that the notice and access conditions imposed by the Attorney General Sessions were unconstitutional as lacking congressional authorization.³⁹ Judge Manion, however, disagreed that the injunction should be applied nationally, and instead believed the injunction should be limited to Chicago.⁴⁰ He argued that imposing a nationwide injunction on these issues was beyond the

³² *Id.*

³³ *Id.* at 951.

³⁴ *City of Chi.*, 888 F.3d at 276-77.

³⁵ *Id.* at 293.

³⁶ *Id.* at 277.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 295 (Manion, J, concurring in the judgment in part and dissenting in part).

scope of the Seventh Circuit.⁴¹ He believed that national injunctions should only be applied when “absolutely necessary.”⁴²

Attorney General Sessions appealed the scope of the injunction, and asked the Seventh Circuit to limit the injunction to Chicago.⁴³ In June 2018, the Seventh Circuit granted the Attorney General’s request to limit the preliminary injunction.⁴⁴ The Seventh Circuit, however, did not address the issue of whether courts have the power to grant nationwide injunctions.⁴⁵

This article will examine the Seventh Circuit’s decision in *City of Chicago v. Sessions* in the context of two core principles of this nation, separation of powers and federalism. This article argues that the Seventh Circuit correctly decided that the notice and access conditions to the Byrne Grant were beyond the scope of power of the Executive Branch. Furthermore, this article argues that if the Seventh Circuit had reviewed the lower court’s decision on the third condition, it would have found the third condition unconstitutional, as the district court later did in issuing a permanent injunction against all three conditions.

Part I of the article examines the history of sanctuary jurisdictions and the principles of separation of powers and federalism. Part II of the article examines the decision in *City of Chicago v. Sessions*, arguing that the Seventh Circuit correctly decided that the access and notice conditions to the Byrne Grant were unconstitutional. Part II also reviews the decisions of other courts regarding the conditions placed on the Byrne Grant by Attorney General Sessions and the executive order issued by President Trump trying to withhold federal funding from sanctuary jurisdictions. Part III looks at the how different courts decided and reviewed the third condition to the Byrne Grant. Finally, Part III discusses how the Seventh Circuit should have decided on the third condition had it been raised on appeal.

⁴¹ *Id.*

⁴² *Id.* at 300.

⁴³ *City of Chi. v. Sessions*, No. 17-2991, 2018 U.S. App. LEXIS 21801, at *3-4 (7th Cir. June 4, 2018).

⁴⁴ *Id.*

⁴⁵ *Id.*

A. Background: Sanctuaries, separation of powers, and federalism in the Trump Era.

1. The History of Sanctuary Jurisdictions.

Sanctuary jurisdictions are not a new concept; they trace back to the 1980s.⁴⁶ The first sanctuary jurisdictions declared themselves sanctuaries to protect refugees with legitimate claims to asylum from federal immigration enforcement.⁴⁷ Since then, sanctuary jurisdictions have emerged to protect immigrant communities across the nation.⁴⁸ However, sanctuary jurisdictions today differ in that they go beyond protecting refugees.⁴⁹ Generally, sanctuary jurisdictions today declare themselves sanctuaries to demonstrate they stand in solidarity with the immigrant communities within their jurisdiction.⁵⁰ There is no one definition for sanctuary jurisdictions, but one thing has held true of sanctuary jurisdictions throughout time: they limit the enforcement of federal immigration laws against non-criminal immigrants with strong ties to the community.⁵¹

In the Trump Era, immigrant communities throughout the United States have been under constant attack.⁵² President Trump has kept his candidacy promises of: (1) mass deportation; (2) removal of Obama immigrant-friendly policies; and (3) extend the wall at the border of Mexico and the United States.⁵³ In his first few weeks in office, President Trump issued anti-immigrant policies, including the initial

⁴⁶ McCormik, *supra* note 5, at 173-74.

⁴⁷ *Id.*

⁴⁸ Marco J. Crocetti, Leon Fresco, and Marissa C. Serafino, *Analyzing the Legality of Proposed Sanctuary City Measures*, LAW360, Jan. 25, 2017.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 628-30 (2017).

⁵³ *Id.*

travel ban, which became known to many as the “Muslim ban.”⁵⁴ These and other policies by his administration invoked great fear in immigrant communities throughout the United States, including policies that separate children from their parents.⁵⁵

In response to these xenophobic policies, several jurisdictions throughout the United States declared themselves sanctuary cities or reaffirmed their sanctuary status.⁵⁶ Because sanctuary jurisdictions limit the enforcement of federal immigration laws, they too have become a target of the Trump administration and have not been spared from scrutiny in President Trump’s tweets.⁵⁷ President Trump has taken active steps to keep his campaign promise to block funding to sanctuary jurisdictions.⁵⁸

a. Congress’ response to sanctuary jurisdictions: The two statutes.

The Trump administration is not the first branch of government to try to overcome sanctuary jurisdictions’ unwillingness to enforce federal immigration laws.⁵⁹ In 1996, Congress enacted two statutes, § 1644 and § 1373, in response to a rise in sanctuary jurisdictions.⁶⁰ Both statutes were created to facilitate information sharing between the federal government and the state and local governments on issues

⁵⁴ *Id.* at 630. Trump signed the initial travel ban, which suspended the admission of all refugees and of individuals from seven predominantly Muslim countries, days after being inaugurated. *Id.*

⁵⁵ Over two thousand migrant children were separated from their parents when they were apprehended by immigrant officials at the border in 2018. David S. Rubenstein, *Immigration Blame*, 87 *FORDHAM L. REV.* 125, 178 (2018).

⁵⁶ See Rumore, *supra* note 4. On November 13, 2016, Chicago Mayor Ram Emmanuel, reaffirmed Chicago’s stance as a “Welcoming City.”

⁵⁷ Alyssa Garcia, *Much Ado About Nothing?: Local Resistance and the Significance of Sanctuary Laws*, 42 *SEATTLE U. L. REV.* 185, 186-87 (2018).

⁵⁸ *Id.*

⁵⁹ McCormick, *supra* note 5, at 174-76.

⁶⁰ *Id.*

of immigration.⁶¹ Congress' intent, however, was to encourage but not require this type of communication.⁶²

Section 1644 prohibited state and local governments from restricting information sharing that would help the federal government enforce federal immigration laws.⁶³ While section 1373, encouraged state and local governments to share information that would help the federal government with the enforcement of immigration laws and policies.⁶⁴ Since these provisions were enacted, courts have limited their scope.⁶⁵ These provisions were used as a tool to try to overcome sanctuary jurisdiction policies in court.⁶⁶ Courts found that state and local laws requiring cooperation with federal authorities regarding the sharing of immigration information were not preempted by federal law.⁶⁷ Despite the small victory, most attempts to overcome sanctuary jurisdictions through these provisions failed.⁶⁸ The provisions were found to authorize the free communication between local and state officials and the federal authorities regarding information that could help enforce federal immigration laws.⁶⁹ They were meant to prevent

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See Doe v. New York City*, 860 N.Y.S.2d 841, 844 (Sup. Ct. N.Y. 2008) (finding that § 1373 does not impose an affirmative duty to report immigration information to federal authorities); *Johnson v. Hurt*, 893 F. Supp. 2d 817, 840 (S.D. Tex. 2012) (finding that Congress' intent in § 1373 was to create a "nationwide system of voluntary information sharing" to assist with federal enforcement of immigration laws).

⁶⁶ *McCormick*, *supra* note 5, at 194.

⁶⁷ *See Fonseca v. Fong*, (finding that a state statute requiring local law enforcement to report certain individuals believed to be undocumented immigrants to federal authorities was not preempted by federal law).

⁶⁸ *See Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1415-16 (2009) (finding that a statute prohibiting local officials from asking an individual's immigration status for the sole purpose of learning their status was not preempted by federal law because it did not prohibit the communication of information to federal authorities, and thus was not in conflict with federal law).

⁶⁹ *McCormick*, *supra* note 5, at 199-200.

states from placing obstacles against this type of communication;⁷⁰ however, the provisions did not require this communication, nor did they permit it when other federal laws protected the information, such as privacy laws.⁷¹ Therefore, even after the enactment of these provisions, sanctuary jurisdictions continued to exist and prevail.⁷² If Congress chose not to require sanctuary jurisdictions to cooperate with the enforcement of federal immigration laws, can the Executive Branch require compliance? Does the Executive Branch have the power to defeat sanctuary jurisdiction's policies?

2. A core principle: Separation of powers.

Separation of powers is a core principle of this nation.⁷³ The framers of the U.S. Constitution specifically built a system of checks and balances to prevent any one branch from becoming too powerful.⁷⁴ Yet, since the nineteenth century, the scope of the Executive Branch has been greatly broadened.⁷⁵ Both Democratic and Republican presidents alike have used the “executive pen” to issue executive orders that carry out their agendas, especially when dealing with issues of immigration.⁷⁶ In fact, since President Trump took office in 2017, he has signed over seventy-seven executive orders, including multiple versions of the travel ban.⁷⁷ President Trump signed more executive orders in his first one hundred days in office than any other recent president.⁷⁸ To put this in perspective, consider that the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *City of Chi. v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018).

⁷⁴ *Id.*

⁷⁵ Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in a Modern-Day America*, 28 J. LEGIS. 1, 2-5 (2002).

⁷⁶ *Id.*

⁷⁷ Leada Gore, *How many executive orders has President Trump signed?*, REAL TIME NEWS FROM AL.COM, July 30, 2018.

⁷⁸ *Id.*

first twenty-four presidents issued 1262 executive orders collectively.⁷⁹ This heavy use of the executive pen has raised the question of what is the scope of the Executive Branch?⁸⁰ The Trump administration has been before the courts on this issue more than once.⁸¹

The framers of the U.S. Constitution were determined to build a system different than the one they escaped.⁸² The framers wanted to ensure that they did not fall under the rule of another tyrant king, so they created a system that ensured history would not repeat itself in the United States.⁸³ First, the framers divided the power of the federal government into three separate branches: judicial, executive, and legislative.⁸⁴ They tasked each branch with specific responsibilities and granted them specific powers to carry out those responsibilities.⁸⁵ Next, the framers created a system of checks and balances to prevent any one branch of the federal government from becoming too powerful.⁸⁶ Each branch of government has ways to check the power of the other two branches.⁸⁷

This system of checks and balances has withstood the test of time and has, for the most part, functioned as the framers intended. Generally, the branches have operated in balance with one another. The power of the Executive Branch, however, has been greatly expanded and continues to be expanded to date. So, does the

⁷⁹ Branum, *supra* note 65, at 9-10.

⁸⁰ *See Id.*

⁸¹ *See* Trump v. Hawaii, 138 S. Ct. 2392, 2399 (2018); City of Chi. v. Sessions, 888 F.3d 272, 277 (7th Cir. 2018).

⁸² Branum, *supra* note 65, at 10-12.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 15. The legislative branch would create the law, the Executive Branch would enforce the law, and the judicial branch would interpret the law. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* For example, the president has the power to veto a legislative bill presented by Congress. The judicial system can declare laws created by Congress or actions taken by the President unconstitutional. In turn, the President checks the courts by through his power to appoint judges.

Executive Branch have the power to condition federal funding to compel states to comply with the enforcement of federal immigration laws? If so, who or what gives the Executive Branch that power? This is exactly the issue that was brought before the Seventh Circuit in *City of Chicago v. Sessions*, but before reviewing the court's decision in that case, it is important we discuss another fundamental principal of United States law, federalism. Can the federal government coerce states to enforce federal laws?

3. Federalism.

There is no doubt that federalism places a limitation on congressional power when it threatens the sovereignty of the states.⁸⁸ In *New York v. United States*⁸⁹ and *Printz v. United States*⁹⁰, the Supreme Court held that the federal government could not compel states to enforce federal laws. In 1996, however, the Second Circuit distinguished the two anti-sanctuary federal statutes from both cases.⁹¹ The court found that Congress had not forced state and local governments to enact or enforce federal regulatory programs.⁹² Does federalism prevent the Executive Branch from conditioning federal funds to compel state and local governments to enforce federal immigration laws? If the Executive Branch had the authority to condition federal funding the way it did, would federalism protect sanctuary cities?

B. The Seventh Circuit's review of City of Chicago v. Sessions.

Chicago has been a sanctuary jurisdiction since 1982, when several Chicago churches harbored refugees protecting them from

⁸⁸ Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 389-391 (2003).

⁸⁹ 505 U.S. 144, 212 (1992).

⁹⁰ 521 U.S. 898, 977 (1997).

⁹¹ McCormick, *supra* note 5, at 185-86.

⁹² *Id.*

enforcement of federal immigration laws.⁹³ In 2006, Chicago codified its sanctuary city policies with the enactment of its welcoming ordinance.⁹⁴ That same year the federal government established the Byrne Grant, which provides state and local law enforcement substantial funds for criminal justice expenses.⁹⁵ For years, Chicago received federal funding through the Byrne Grant without any issues.⁹⁶

Over the years, several bills have been introduced in the House of Representatives and the Senate attempting to condition federal grants in a way that would coerce states and local governments to cooperate with the enforcement of federal immigration laws; however, none of these bills have become law.⁹⁷ On January 25, 2017, President Trump issued an executive order requiring Attorney General Sessions to ensure that sanctuary jurisdictions were no longer eligible to receive certain federal funding, including the Byrne Grant.⁹⁸ This order was challenged in a federal court in California where it was permanently enjoined.⁹⁹

After President Trump's order was enjoined, Attorney General Sessions directly issued three conditions to the Byrne Grant, again attempting to coerce states and local governments to comply with the enforcement of federal immigration laws.¹⁰⁰ The three conditions were: notice, access, and compliance.¹⁰¹ The notice condition required local law enforcement to notify federal agents in advance when they scheduled the release of individuals suspected to be in violation of federal immigration laws.¹⁰² The access condition required local law

⁹³ Rumore, *supra* note 4.

⁹⁴ See CHICAGO, ILLINOIS, MUN. CODE § 2-173-005 *et seq.* (2007).

⁹⁵ City of Chi. v. Sessions, 888 F.3d 272, 276-80 (7th Cir. 2018); City of Chi. v. Sessions, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).

⁹⁶ City of Chi. v. Sessions, 888 F.3d at 276-80.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² City of Chi. v. Sessions, 264 F. Supp. 3d 933, 937 (N.D. Ill. 2017).

enforcement to give federal agents access to its detention facilities and detained individuals.¹⁰³ The final condition required local law enforcement to comply with federal statute § 1373, which prevents local and state governments from restricting information sharing between local law enforcement and federal immigration agents.¹⁰⁴

Chicago challenged all three conditions to the Byrne Grant in federal district court, because these conditions directly conflicted with its sanctuary policies.¹⁰⁵ Chicago argued that these conditions were unconstitutional and asked the district court to issue a preliminary injunction for all three conditions.¹⁰⁶ The district court agreed with Chicago that the notice and access conditions were unlawful and issued a nationwide preliminary injunction for those conditions.¹⁰⁷ The court held that Attorney General Sessions had no authority to issue those conditions, and that any efforts to impose the conditions violated the separation of powers and were *ultra vires*.¹⁰⁸ The district court, however, did not grant a preliminary injunction for the compliance condition.¹⁰⁹

This case was brought before the Seventh Circuit, on appeal by Attorney General Sessions for the notice and access conditions.¹¹⁰ The third condition was not reviewed by the Seventh Circuit.¹¹¹ Attorney General Sessions argued that the lower court's decision was wrong because he had statutory authority to impose the access and notice conditions.¹¹² He said that his authority for his actions came from a statute defining the duties and functions of the Attorney General.¹¹³ He

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 936.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *City of Chi. v. Sessions*, 888 F.3d 272, 282 (7th Cir. 2007).

¹⁰⁹ *City of Chi.*, 264 F. Supp. 3d at 936.

¹¹⁰ *City of Chi.*, 888 F.3d at 276-80.

¹¹¹ *Id.*

¹¹² *Id.* at 282-84.

¹¹³ *Id.*

specifically pointed to a section of the statute that reads, “[t]he Attorney General shall exercise such powers and functions . . . , including placing special conditions on all grants, and determining priority purposes for formula grants.”¹¹⁴ The Seventh Circuit said Attorney General Sessions’ interpretation of this statute was contrary to Congress’ intent.¹¹⁵ Furthermore, the Court pointed out that this section of the statute would be an odd place for Congress to grant such a power.¹¹⁶

The Seventh Circuit stressed that the issue before them was one of separation of powers and not immigration policies.¹¹⁷ In reviewing whether the Executive Branch had the power to withhold federal funding from sanctuary jurisdictions, the Court first turned to the U.S. Constitution, which exclusively provides that the power of the purse belongs to Congress.¹¹⁸ The Attorney General, however, did not contend that the Executive Branch has inherent power to condition grants.¹¹⁹ Instead, Attorney General Sessions argued that his power to condition federal funding originated with Congress, but was delegated to him.¹²⁰ The Seventh Circuit agreed that Congress can delegate certain powers to the Executive Branch, but disagreed with the Attorney General that Congress did so in this situation.¹²¹

To determine whether the Executive Branch overstepped its power, the Court analyzed whether Congress delegated the power to condition the federal funding in question to the Executive Branch.¹²² First, the Court looked to the statute, to determine if there was an explicit grant of power from Congress.¹²³ The statute does not

¹¹⁴ *Id.* at 284 (quoting 34 U.S.C. 10102(a)(6) (West 2017)).

¹¹⁵ *City of Chi.*, 888 F.3d at 276-80.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 277.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 283.

¹²⁰ *Id.*

¹²¹ *Id.* at 286.

¹²² *Id.* at 283-86.

¹²³ *Id.*

explicitly grant the Executive Branch the power to withhold federal funding for the Byrne Grant.¹²⁴ The Seventh Circuit acknowledged that the statute granted Attorney General Sessions with some powers typically reserved for Congress, but the Court concluded that none of the provisions in the statute gave him the authority to impose such conditions on federal funding.¹²⁵

The Seventh Circuit also addressed this issue from a separation of powers stand point.¹²⁶ The Court was concerned that if the Executive Branch could not only determine policy, but also enforce it, then there would be no check against tyranny – the very reason our founders even created a system with separation of powers.¹²⁷ Judge Rovner said, “[i]t falls to us, the judiciary, as the remaining branch of government, to act as a check on such usurpation of power.”¹²⁸

1. The Ninth Circuit’s review of *City & County of San Francisco v. Trump*

The Ninth Circuit, like the Seventh Circuit, found that the Executive Branch violated the separation of powers principle, “an integral part of the Founder’s design.”¹²⁹ However, the court reached this determination on a slightly different matter.¹³⁰ Instead of reviewing the conditions placed on the Byrne Grant by Attorney General Sessions, the Ninth Circuit reviewed President Trump’s Executive Order 13,768, signed on January 25, 2017.¹³¹ Like Attorney General Sessions conditions on the Byrne Grant this executive order was intended to withhold federal funding from sanctuary

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 277.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1231-32 (9th Cir. 2018).

¹³⁰ *Id.*

¹³¹ *Id.*

jurisdictions.¹³² The executive order required the Attorney General to ensure that any jurisdiction that refused to comply with 8 U.S.C § 1373 was not eligible to receive federal grants.¹³³ The Ninth Circuit found that President Trump's executive order "direct[ed] the agencies of the Executive Branch to withhold funds appropriated by Congress in order to further the Administration's policy objective of punishing cities and counties that adopt so-called 'sanctuary' policies."¹³⁴

The Ninth Circuit conducted a similar analysis to the Seventh Circuit in reaching its decision.¹³⁵ The President's power "must stem either from an act of Congress or from the Constitution itself."¹³⁶ The court looked first to the U.S. Constitution to determine who has the power to condition federal grants.¹³⁷ The Ninth Circuit pointed out that the power of the purse is an "exclusive congressional power."¹³⁸ The court found that the President's "power [was] at its lowest ebb" here because Congress had not delegated to the President the power to condition new federal grants with compliance of 8 U.S.C § 1373.¹³⁹ The Ninth Circuit stressed that the Trump administration "ha[d] not even attempted to show that Congress authorized it to withdraw federal grant[s]" from sanctuary jurisdictions.¹⁴⁰ Furthermore, the court pointed out that Congress had repeatedly rejected legislation that aligned with the goals of President Trump's order.¹⁴¹ The Ninth Circuit

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1233.

¹³⁵ *Id.* at 1232-35.

¹³⁶ *Id.* at 1233 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585(1952)) (internal quotations omitted).

¹³⁷ *City & Cnty. of S.F. v. Trump*, 897 F.3d at 1232-35.

¹³⁸ *Id.* at 1231.

¹³⁹ *Id.* at 1233-34 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)) (internal quotations omitted).

¹⁴⁰ *City & Cnty. of S.F. v. Trump*, 897 F.3d at 1234.

¹⁴¹ *Id.*

found that the Executive Branch had “claimed for itself Congress’s exclusive spending power.”¹⁴²

Without congressional authorization, the Ninth Circuit held that the Executive Branch could not refuse to issue federal grants to sanctuary cities.¹⁴³ Therefore, on August 1, 2018, the Ninth Circuit affirmed the lower court’s decision in part.¹⁴⁴ The Ninth Circuit remanded the case only for the reconsideration of the scope of the injunction.¹⁴⁵

While the Ninth Circuit reviewed a slightly different matter, its decision focused on the same core principle of separation of powers. Both cases dealt with the Executive Branch, under President Trump, attempting to withhold federal funding from jurisdictions that did not help enforce federal immigration laws. One court reviewed the Attorney General’s actions in reaching this goal, while the other reviewed the President’s similar actions. What is important is that both courts reached the conclusion that Congress controls federal spending, and not the Executive Branch, and that Congress has not delegated that power to the Executive Branch.¹⁴⁶ The Ninth Circuit also agreed with the Seventh Circuit that the Executive Branch could only withhold federal funding from sanctuary jurisdictions if it had congressional authorization.¹⁴⁷ Therefore, finding Executive Order 13,768 unconstitutional.¹⁴⁸ Additionally, two other district courts have found against the Executive Branch on similar issues for the same reason: the power of the purse belongs to Congress and Congress has not delegated that authority to the Executive Branch.¹⁴⁹ The U.S. Supreme Court has yet to weigh in on this issue.

¹⁴² *Id.*

¹⁴³ *Id.* at 1231.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See City of Seattle v. Trump*, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376, at *26-27 (W.D. Wash. Oct. 19, 2017) (finding President Trump’s order

C. The third condition: Compliance with 8 U.S.C. § 1373.

In 1996, Congress enacted 8 U.S.C § 1373, a statute that encouraged communication between state and local governments and the federal government regarding individual's immigration status.¹⁵⁰ The statute was meant to facilitate information sharing between the federal government and the state and local governments on issues of immigration.¹⁵¹ Congress' intent, however, was not to require such communication.¹⁵² Section 1373 simply encouraged state and local governments to share information that would help the federal government with their efforts of enforcing immigration laws and policies.¹⁵³ Nonetheless, this statute was used as a tool to try to overcome sanctuary jurisdiction policies in court.¹⁵⁴ But most attempts to overcome sanctuary jurisdictions through this statute failed.¹⁵⁵ Courts found the statute to authorize the free communication between local and state officials and the federal authorities regarding information that could help enforce federal immigration laws.¹⁵⁶ They were meant to prevent states from placing obstacles against this type

conditioning funding to sanctuary cities unconstitutional); *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 344 (E.D. Pa. 2018) (finding the three conditions imposed by the Attorney General invalid and in violation of both statutes and the U.S. Constitution).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ McCormick, *supra* note 5, at 194.

¹⁵⁵ See *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1415-16 (2009) (finding that a statute prohibiting local officials from asking an individual's immigration status for the sole purpose of learning their status was not preempted by federal law because it did not prohibit the communication of information to federal authorities, and thus was not in conflict with federal law).

¹⁵⁶ McCormick, *supra* note 5, at 199-200.

of communication;¹⁵⁷ however, the provisions do not require this communication.¹⁵⁸

On January 25, 2017, only five days after his inauguration, President Trump issued an executive order requiring the Attorney General to ensure that any jurisdiction that refused to comply with 8 U.S.C § 1373 was not eligible to receive federal grants.¹⁵⁹ This order was challenged in a federal court in California where it was permanently enjoined.¹⁶⁰ The Ninth Circuit held that the executive order violated the separation of powers principle.¹⁶¹ The Ninth Circuit said that the Executive Branch could not refuse to issue federal grants to sanctuary cities without congressional authorization.¹⁶²

In July 2017 Attorney General Sessions threatened that federal funding to sanctuary jurisdictions would be withheld if those jurisdictions failed to cooperate in the enforcement of federal immigration laws.¹⁶³ He added three new conditions to the Byrne Grant: notice, access, and compliance.¹⁶⁴ The third condition required local and state jurisdictions to comply with federal statute § 1373 that encourages information sharing between local law enforcement and federal immigration agents.¹⁶⁵

On September 15, 2017, a district court found that the three new conditions of access and notice were unconstitutional.¹⁶⁶ The district court applied a preliminary nationwide injunction on those conditions, but not the third condition.¹⁶⁷

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *City of Chi. v. Sessions*, 888 F.3d 272, 276-80 (7th Cir. 2018).

¹⁶¹ *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1231-32 (9th Cir. 2018).

¹⁶² *Id.* at 1231.

¹⁶³ *City of Chi. v. Sessions*, 888 F.3d at 276-77 (7th Cir. 2018).

¹⁶⁴ *Id.*

¹⁶⁵ *City of Chi.*, 264 F. Supp. 3d at 937.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 951.

Attorney General Sessions appealed the preliminary injunction to the access and notice conditions.¹⁶⁸ The Seventh Circuit, however, did not review the constitutionality of the third condition.¹⁶⁹ If the Seventh Circuit had reviewed the third condition it would have found that condition unconstitutional for the same reason it found the other two conditions unconstitutional. First, the power of the purse exclusively belongs to Congress. Second, Congress has not delegated this power to the Executive Branch. When issuing the preliminary injunction, the district court did not find there was sufficient evidence at that time to find the third condition unconstitutional. The court had a more difficult time finding that condition unconstitutional because the condition is based on a statute. However, when deciding whether to grant the permanent injunction the district court found that the third condition was also unconstitutional on the same grounds it found the other conditions unconstitutional. For those reason, the district court granted the permanent injunction against all three conditions, including the condition of compliance. Similarly, other district courts have found the compliance condition unconstitutional.

CONCLUSION

During President Trump's campaign, he vowed to deport all immigrants with serious criminal records, but his administration has deported more than just the "Mexican drug dealers, criminals, and rapist." The Trump administration has taken an aggressive stance in enforcing federal immigration laws, and to advance this hardline position on immigration enforcement, President Trump issued an executive order conditioning federal funding trying to force sanctuary jurisdictions to cooperate in the enforcement of federal immigration laws. When the order was enjoined by a federal court in California, former Attorney General Sessions placed three conditions on the Federal Byrne Grant, requiring jurisdictions to comply with federal immigration enforcement laws.

¹⁶⁸ *City of Chi.*, 888 F.3d at 276-77.

¹⁶⁹ *See City of Chi. v. Sessions*, 888 F.3d at 276-77 (7th Cir. 2018).

Separation of powers is a core principle of this nation. The framers of the U.S. Constitution specifically built a system of checks and balances to ensure that no branch would become too powerful. Yet, since the nineteenth century, the scope of the Executive Branch has been greatly broadened. In recent years, that scope has broadened further through the President's use of executive orders. The scope of the Executive Branch's power has repeatedly been a question before the courts under the Trump administration, especially in terms of immigration policies. Does the U.S. Constitution grant the Executive Branch the power to withhold federal funding from jurisdictions that do not enforce federal immigration laws? If not, who gave the Executive Branch that authority?

The U.S. Constitution leaves no doubt that the power of the purse belongs to Congress and not the Executive Branch. While Congress can, it has not authorized the Executive Branch to condition federal grants in this manner. In fact, Congress has repeatedly refused legislation that ties federal funding to immigration laws, including legislation proposed by the 115th Congress. Plain and simple, President Trump's executive order and Attorney General Sessions' conditions to the Byrne Grant, violated the U.S. Constitution's principle of separation of powers. Multiple federal courts have found President Trump's order and Attorney General Sessions' conditions to federal funding at least partially unconstitutional on this ground. The Seventh Circuit in *City of Chicago v. Sessions*, found two of Attorney General Sessions' conditions to the Byrne Grant unconstitutional. The Seventh Circuit described the Executive Branch's actions as a "usurpation of power."¹⁷⁰ Judge Rovner stressed: "We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor."¹⁷¹

I could not agree more with the Seventh Circuit: no one branch should have all that power. The Executive Branch tried to resolve a broken immigration system with a stroke of pen, but pushing xenophobic policies is not the answer. And, the Executive Branch

¹⁷⁰ *City of Chi. v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018).

¹⁷¹ *Id.*

cannot expect state and local governments to want to enforce such extreme, harsh policies, policies that rip young children out their parent's arms. A broken immigration system will not be resolved overnight, much less by a single executive order. Violating the core principles of separation of powers and federalism are not the solution. Congress and the Executive Branch must work together to resolve this issue, but this issue will never be fixed if our government continues acting based on party lines. If the federal government wants state and local governments to enforce federal law, the branches must work together to pass non-xenophobic legislation that fixes our immigration system.